

**United States Department of Labor
Employees' Compensation Appeals Board**

C.J., Appellant

and

**U.S. POSTAL SERVICE, ENERGY CENTER
STATION, Lafayette, LA, Employer**

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**Docket No. 14-644
Issued: June 10, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 29, 2014 appellant filed a timely appeal from an October 4, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied waiver of the \$14,374.21 overpayment of compensation.

FACTUAL HISTORY

The case was before the Board on two prior appeals. OWCP had initially found an overpayment of \$24,739.26 had been created from January 21, 2004 to April 2, 2007 because appellant was paid compensation based on an incorrect pay rate. By decision dated May 3, 2011,

¹ 5 U.S.C. § 8101 *et seq.*

it finalized a determination that a \$24,739.26 overpayment was created and denied waiver. In a letter dated May 13, 2011, OWCP advised appellant that she was entitled to compensation from July 8, 2010 to April 1, 2011 in a gross amount of \$22,057.92. It indicated that an “overpayment deduction” of \$17,000.00 would occur, as well as an overpayment deduction of \$1,000.00 from compensation owed for the period April 2 to May 7, 2011. The letter indicated that a \$200.00 overpayment deduction would be made from continuing compensation payments.

By order dated June 12, 2012, the Board remanded the case to OWCP to properly consider evidence as to waiver of the overpayment that had been submitted prior to a May 3, 2011 final overpayment decision.² In a decision dated September 17, 2012, OWCP found the overpayment amount was \$14,074.21. It found that appellant had paid \$22,400.00 toward the overpayment and therefore was entitled to a refund of \$7,325.79.

In a decision dated June 7, 2013, the Board found the overpayment amount was \$14,374.21.³ The case was remanded on the issue of waiver, as OWCP had made no findings on the issue. The Board specifically noted that the repayment of an overpayment does not preclude OWCP from properly determining whether appellant was entitled to waiver. The history of the case as provided by the Board on the prior appeals is incorporated herein by reference.

OWCP sent appellant an overpayment recovery questionnaire (OWCP-20) and requested submission of documentation supported expenses and income. On July 5, 2013 appellant submitted an OWCP-20 reporting \$920.08 in monthly income and \$1,356.75 in monthly expenses. She reported \$28.01 in cash and bank account assets and submitted copies of monthly bills.

By decision dated October 4, 2013, OWCP denied waiver of the overpayment. It found the evidence established that appellant needed all of her income for monthly expenses. According to OWCP, the \$14,074.21 collected from appellant “is an asset greater than the resource base” and therefore recovery would not defeat the purpose of FECA or be against equity and good conscience.

LEGAL PRECEDENT

Section 8129(b) of FECA⁴ provides: “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”⁵ Since OWCP found appellant to be without fault in the creation of the overpayment, it may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and

² Docket No. 12-197 (issued June 12, 2012).

³ Docket No. 13-526 (issued June 7, 2013).

⁴ *Supra* note 1.

⁵ *Id.* at § 8129(b).

good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to section 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary “needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses,” and, also, if the beneficiary’s assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.⁶ For waiver under the “defeat the purpose” of FECA standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.⁷

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

ANALYSIS

In the present case, OWCP recovered money from compensation owed to appellant beginning on July 8, 2010 as an “overpayment deduction.” The Board has noted that in determining the amount of an overpayment, OWCP should not be offsetting the amount with an underpayment of compensation as this deprives a claimant of administrative due process.⁸ Although in this case, OWCP issued a final overpayment determination and then shortly thereafter determined that recovery would be made from compensation owed for a prior period, the recovery in this case has clearly impacted the proper development of the waiver issue. As the Board clearly stated in its June 7, 2013 decision, the recovery of an overpayment under these circumstances does not obviate the necessity of making a proper determination as to waiver in accord with established procedures.

OWCP made a finding that appellant had an asset greater than the resource base, using the overpayment amount recovered. The amount recovered from compensation owed does not constitute a nonexempt asset used to determine a resource base. The asset base is determined from the established sources as outlined in OWCP procedures. Liquid assets include such sources as cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposit.⁹ Nonliquid assets include the fair market value of an owner’s equity in property such as

⁶ OWCP procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁷ See *Robert E. Wenholz*, 38 ECAB 311 (1986).

⁸ See *B.T.*, Docket No. 13-1619 (issued February 14, 2014).

⁹ *Supra* note 7 at Chapter 6.200.6(a)(4) (June 2009).

a camper, boat, second home and furnishings/supplies, vehicle(s) (*i.e.*, any vehicles above the two allowed per immediate family), jewelry and artwork.¹⁰

There is no provision for using a lump-sum “overpayment deduction” for compensation payable to a claimant. Appellant never actually received the amount deducted; it was never deposited into her bank account. If the compensation had been paid contemporaneous with the 28-day period covered by each payment, then OWCP would not have considered it as a lump-sum asset. There is no basis for finding that it represented a liquid asset to appellant. As to a nonliquid asset, these assets are clearly based on actual property owned and possessed by appellant. While it may seem administratively inefficient to require OWCP to issue the compensation owed to appellant and then recover an overpayment, if OWCP is going to rely on the compensation owed as an asset for waiver purposes, it must issue the compensation payment to appellant and therefore be available to appellant as an asset.

The Board finds that OWCP has not properly determined the waiver issue. OWCP must follow its established procedures and make a proper determination as to whether appellant is entitled to waiver of the overpayment. The case will again be remanded to OWCP for a proper waiver determination. After such development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that OWCP did not properly deny waiver of the overpayment in this case.

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 4, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 10, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board